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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of Alabama

REPLY TO MOTION TO AFFIRM

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TABLE OF CASES

	Page
Amos Treat and Company v. Securities Exchange Commission, 1962, 306 F. 2d 260	7
Baggette v. Baggette, 182 So. 2d 898	3
Commercial Transport Inc. v. U.S., (D.C. Ill.), 1959, 173 F. Supp. 524, Aff'd 80 S. Ct. 50	7
Dixie Highway Express, Inc. et al. v. U. S., et al., 242 F. Supp. 1016 (D.C. Miss.)	5
Federal Trial Examiners Conference v. Ramspeck, D.C. 1952, 104 F. Supp. 34, Aff'd 202 F. 2d 312	3
Hickey v. Celebreeze, D.C. Okl. 1964, 229 F. Supp. 5	4
Kerner v. Celebreeze, C.A. NY 1965, 340 F. 2d 736	3
NLRB v. National Die-Casting Company, (C.A. 7 1953) 207 F. 2d 344	4
State Corporation of Kansas v. Federal Power Commission, (C.A. 8 1953) 206 F. 2d 690 Cert. den. 74 S. Ct. 307, rehearing denied 74 S. Ct. 862	7
Universal Camera Corporation v. Labor Board, 340 U.S. 474, 492-497	4
Walled Lake Door, 31 F.R.D. 258, Sept. 6, 1962 (D.C. Mich.)	5
Walls v. Leadway Co-op Mills, 176 So. 2d 16, 278 Ala. 83	3
Zuzich Truck Lines, Inc. v. U. S. et al., (D.C. Kan. 1963) 224 F. Supp. 457	5

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Pursuant to Rule 16 (3) of the Rules of this Court, the appellant, Floyd & Beasley Transfer Co., Inc., and intervening appellants, file this their Reply to the Motion to Affirm heretofore filed on behalf of the United States of America, The Interstate Commerce Commission and intervening appellees.

ARGUMENT

The essence of this appeal, as it pertains to the examiner's findings of fact and conclusions, is to contest the position taken by the Interstate Commerce Commission and other appellees that the Interstate Commerce Commission is free to tread where this Honorable Court is forbidden to tread. The appellees say that the Interstate Commerce Commission can reverse, without a specific explanation of error in the facts or a designation of misapplication of law, the detailed findings of fact by the examiner with the mere conclusion that those facts are incorrect.

This Honorable Court, under established precedent, is bound by the findings of a master or a District Court Judge in a non-jury case as through there was a jury verdict and the court will not pry into the evidence or re-evaluate that evidence unless the facts found are contrary to the testimony or based upon misapplication of the law.

The appellants recognize that the Interstate Commerce Commission is due the deference of an expert, but there is an extreme difference in applying the expertise of the Interstate Commerce Commission to the facts after they have been found as opposed to the Commission changing the facts from those found by the examiner in the absence of contrary testimony or misapplication of the law.

The appellants say that the Interstate Commerce Commission does not have that power and unless the examiner's finding of fact is specifically shown from the record to be erroneous or that there is a misapplication of law, those facts found by the examiner are binding upon the Commission.

There is no established law to the contrary and the established law indicates not only that the matter has not been fully considered, but that upon consideration the appellants' contention should be correct.

Your appellants have pointed out above that the weight accorded the findings of a master or judge in a non-jury case is that of a jury verdict. In the West Publishing Company Digest under Appeal and Error Key No. 1017, there are innumerable decisions throughout the country pointing out this great weight of authority. The latest Alabama case of *Walls* v. *Leadway Co-op Mill,* 176 So. 2d 16, 278 Ala. 83, is authority for the proposition that the report of a register on evidence given orally before him is accorded the weight of a jury verdict, and even if from the evidence as a whole it is a matter of doubt as to whether the finding of fact was correct and intelligent persons might entertain different opinions as to the matter, the findings should not be disturbed.

The 1966 Alabama Case *Baggette* v. *Baggette,* 182 So. 2d 898, supports the above proposition as it pertains to evidence heard orally by a trial court and further states that the findings should not be disturbed unless the judgment or decree is plainly and palpably wrong and unjust.

The above propositions of law, for practical purposes, are unanimously in accord throughout the United States. Here appellants say that the report of the examiner is analogous to and should fall within the same propositions of law. If this is not so, there would be no reason for the holding of this Honorable Court in the case of *Federal Trial Examiners Conference* v. *Ramspeck,* D.C. 1952, 104 F.Supp. 34, Aff'd 202 F. 2d 312, reversed on other grounds 73 S. Ct. 570, 345 U.S. 128, 97 L. Ed. 1360, rehearing denied 73 S. Ct. 778, 345 U.S. 931, 97 L. Ed. 872. In the referenced case, this Honorable Court stated that a major purpose of Title 5 USC 1010, which provides, among other things, for the appointment of examiners and for their removal only for good cause by the Federal Civil Service Commission, was to make the hearing examiners *independent* of pressure from agencies whose cases they pass upon.

In the case of *Kerner* v. *Celebreeze,* C.A. NY 1965, 340 F. 2d 736, it was stated that one of the main reasons for

making it mandatory for the examiner who has received the evidence to render some form of decision is to provide the Commission with his evaluation of the credibility of the witnesses. The case, *Hickey* v. *Cellebreeze,* D.C. Okl. 1964, 229 F.Supp. 5, pointed out that the trier of facts is to determine *which version* of conflicting evidence is to prevail and weigh evidence accordingly.

The important function of the examiner is further emphasized by the fact that Title 5, U.S.C. Sec. 1007(a) provides in part that:

> "Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within the time provided by rule, such decisions shall without further proceedings then become the decision of the agency."

It stands to reason, therefore, that the examiner holds a position of no minor importance. If it were not so, there would be no basis for the above. Appellants have previously pointed out that the Examiner's opinion should be given serious consideration in accordance with the decision of this Court in the case of *Universal Camera Corporation* v. *Labor Board,* 340 U.S. 474, 492-497.

If this Examiner is to be accorded the important role that the statutes and the laws of these United States vest in him, why then should not the Interstate Commerce Commission which is also a creature of statute be required to recognize the finality of his findings as do the courts? It is respectfully submitted that the very reason that the courts say that they should not interfere with the application of the Commission's expertise and judgment is based upon the fact that the examiner, for the Commission, has viewed the witnesses and has been able to determine, expertly, the facts which in turn determine the case. If this were not so, the proposition would not have been established in the case of *NLRB* v. *National Die-Casting Company,* (C.A. 7 1953) 207 F. 2d 344, that where neither the

reporting examiner nor the NLRB saw or heard the witnesses testify and the testimony, taken by the examiner who died before preparing his report, was furnished to the successor examiner after the evidence had been transcribed, the usual advantages enjoyed by the trier of facts in seeing and hearing witnesses and determining credibility were not present and the *Court of Appeals would scrutinize the evidence closely.*

In other words, if, for example, the testimony had been furnished by affidavit as opposed to having been taken orally before an examiner, this Court would be free to examine the evidence on which the Commission arrived at its finding. We think, for these reasons, that the Commission is required, under the mandate of the case of *Dixie Highway Express, Inc., et al.* v. *U. S., et al.,* 242 F.Supp. 1016 (D.C. Miss.), to state with more than ordinary specificity any contrary findings of fact available to it in the record which influenced its decision; that the Commission could not deal with the record throughout its report in vague and nebulous terms or deal with the problem in its entirety in generalities without favoring the report with any facts to be found in the record.

If it were otherwise, what *effective* right of appeal would an applicant or the protestants have from a report and recommended order of an examiner? The existing procedures deny an effective appeal.

When the exceptions are filed to the examiner's report and recommended order, the case is swallowed up in the maw of the great non-entity. It has been firmly established that all of the mental processes of the Interstate Commerce Commission, its internal memoranda, staff recommendations, and instruments are privileged. See *Walled Lake Door,* 31 F.R.D. 258, Sept. 6, 1962 (D.C. Mich.), *Zuzich Truck Lines, Inc.* v. *U. S. et al.,* (D.C. Kan. 1963) 224 F.Supp. 457.

There is no question but that in this instance, as in all others, the case was assigned to an unidentified clerk of the Commission for review and preparation of a report for Division I of the Commission. What the qualifications were of that unidentified individual, or what influenced his opinions or prejudices will never be revealed, and certainly not in comparison with the obvious and superior qualifications and independence of the examiner. After the preparation of the report from Division I by this non-entity, Division I issued its report on March 11, 1965. Such patent error was committed in that report that Division I—Acting as an Appellate Division—of its own motion on March 31, 1965—vacated and set aside the previous report and reopened the case for reconsideration on the existing record. If the Commission acted within its normal routine, the case was again referred to the same unidentified clerk who had written the erroneous report of March 11, 1965.

In the meantime, your appellants had filed their Petition for Further Hearing on June 8, 1965, but again this same division, Division I, Acting as an Appellate Division, denied that petition on July 14, 1965.

On the same day, Division I, Acting as an Appellate Division, after slight alteration to correct the patent error in the report of the Commission of March 11, 1965, issued its report which, for practical purposes, was a verbatim copy of the March 11, 1965, report.

In accordance with the procedures before the Commission, your appellants appealed that decision and in that appeal your appellants were required to go *back* to the same Division I, Acting as an Appellate Division, with its Petition for Reconsideration. Needless to say, on November 12, 1965, Division I, Acting as an Appellate Division, denied the appellants' Petition for Reconsideration. It is presumed that normal procedures were followed and the same non-entity who had written the previous reports also

passed on and recommended the denial of the Petition for Reconsideration.

Appellants say that it is inconceivable that an individual would reverse himself from his initial decision and it is extremely doubtful that Division I of the Commission would reverse itself after its initial decision.

It is submitted that by such appellate procedure the appellants have not been accorded due process in the resolution of contested questions by an impartial and disinterested tribunal. See *Amos Treat and Company* v. *Securities and Exchange Commission,* 1962, 306 F. 2d 260. Perhaps, if there had been a right of appeal to another of the divisions of the Commission or to a different body so that a fresh opinion could have been sought as opposed to seeking to overcome a fixed opinion, due process would have been answered.

Certainly due process has not been afforded in this instance where not only has the right of appeal been restricted to the same division in each instance, but there has been no specificity of error afforded by that division to support the basis for overturning the examiner's opinion. A mere assertion in the opinion of the Commission that the Commission had examined all available evidence did not suffice to show on review that the conclusion of the Commission was the result of the application of the Commissions' expertise and judgment. See *State Corporation of Kansas* v. *Federal Power Commission,* (C.A. 8 1953) 206 F. 2d 690, Cert. den. 74 S. Ct. 307, rehearing denied 74 S. Ct. 862. Although it is not required that the Commission give a detailed explanation of its decision, it is required that sufficient reason be given by the Commission for the denial of a certificate in order to permit the reviewing court to determine the basis for its action. See *Commercial Transport Inc.* v. *U.S.,* (D.C. Ill.), 1959, 173 F.Supp. 524, Aff'd 80 S. Ct. 50.

As examples of unsupported change in this case, Division I, Acting as an Appellate Division, chose to discard the findings of the examiner which was supported by the oral testimony of the small shippers (TR 112, 202-452) on the grounds that they were not supported by documentary evidence (70a). Division I, Acting as an Appellate Division, by inference, stated that Baggett offered service that took no longer than second day when the examiner had pointed out that in more than 15% of the shipments, Baggett took three or more days to deliver these shipments (51a, 71a).

Division I, Acting as an Appellate Division, repeatedly referred to Ryder's service (69a, 70a) even though the affidavits filed prior to this report established that Ryder had *abandoned* service. Division I, Acting as an Appellate Division, also chose to ignore the fact that a large number of the shippers routed their shipments to the appellant's terminal in Sycamore (11a) in order to obtain overnight service and that these four towns were almost wholly dependent on motor transportation (17a).

Division I, Acting as an Appellate Division (74a), stated that, "It also appears that many of the shippers are *primarily interested* in outbound transportation of volume, rather than less truckload shipments." (Emphasis added) If the record is examined, only *two* of the thirty-two supporting shippers at the four points were "primarily interested" in truckload service.

On the same page, Division I stated that these shippers "have not tried or are unaware of the variety of services available from regular route as well as irregular route protestant carriers." In this connection, the only carriers authorized to serve any of the four base points were Malone, Bowman, Dixie Highway, Baggett, Alabama Highway, Georgia Highway-B.C., Parish Dray Lines, Anniston-Talledega and Ryder. Bowman, Malone, Alabama Highway and Parish established in their testimony that they trans-

ported truckload shipments only. Dixie Highway had a 5,000 pound minimum restriction and withdrew its opposition to the application. In addition, it was able to serve only Talledega and Sylacauga. Ryder was authorized to serve the points of Childersburg, Sylacauga, and Sycamore, but according to the affidavit filed with the Commission prior to the last order of Division I, it has abandoned service at those points. Anniston-Talledega handled LTL shipments, however it served between Talledega and Birmingham only.

Baggett was authorized to serve Childersburg and Sylacauga only but their service was repeatedly condemned by practically every one of the shippers (TR 340-342, 1014, 655, 516-517, 896-897, 184, 381-382, 481-483, 752, 880, 1008-1010, 132, 381-382, 551-552, 691, 695-696, 708).

Georgia Highway-B.C. holds authority to serve all four of the points and does render some service with reference to LTL shipments, however, its service was also repeatedly condemned by all of the witnesses who have used their service. (TR 551, 561, 548, 619, 646, 642-643, 997, 986). In addition, like Baggett, it cannot serve any points except Atlanta and Chattanooga.

In fact, when Georgia Highway introduced its traffic exhibit, the reliability of the underlying documents were questioned. The delivery date indicated on the documents, which was often penciled in by the drivers, was challenged by the shipper witnesses. Witness Roberts, who maintained that Georgia Highway required between two and seven days to provide service from Atlanta, commented as follows on a bill purporting to show overnight service from Atlanta:

> "This (shipping bill) shows overnight service and in the 15 years I have been in the parts business, I have never received overnight service from Georgia (Highway). I don't know how the date got there as overnight. I have never received anything overnight." (TR 627)

It is obvious from all the above, and they are just a few among many, that there is no basis for the statement in the brief of the United States and the Interstate Commerce Commission (page 6) that "Here there was no issue of credibility and no other evidence which might confer special significance upon the examiner's findings."

It is submitted that it is these various things such as the above issue of credibility (for it is certain that all of these small shippers are not going to lie on the stand) that the examiner observed, adequately summarized and formed the basis for his findings of fact. The findings should not be discredited lightly with broad conclusions and certainly not without specific findings from contrary testimony in the record. The appellants submit that the examiner's findings of facts and conclusions should have been treated by the Commission and should be treated by the Court the same as a jury verdict; they should not have been changed except upon specific example showing either the misapplication of the law or facts found to be contrary to the testimony. The deference owed an expert tribunal should not be allowed to slip into what amounts to judicial inertia.

In the Motion to Affirm filed on behalf of the United States, and the Interstate Commerce Commission (page 7) comment is made that: -

> "Appellant also contends that the Commission erred when it refused to reopen the record for further hearing because *one* of the numerous carriers serving the area subsequently reduced its service." (Emphasis added)

Appellants submit that the comment is misleading, and is not an accurate statement of your appellants' contention of error.

It has been pointed out above and in the affidavits to the Commission that, at the time of a hearing, there were a maximum of three carriers offering LTL service to each of the four points here involved. Of these, Dixie Highway

Express which was authorized to serve between Talledega and Sylacauga on the one hand, and Atlanta on the other, was subject to a 5,000 pound minimum restriction. This carrier later withdrew its protest and stated that it thought Floyd & Beasley should be granted the authority.

Baggett Transportation Company is authorized to serve between Childersburg and Sylacauga, on the one hand, and Atlanta and Chattanooga on the other. That service was condemned, as pointed out above, by all of the shippers at those two points. Anniston-Talledega was authorized to serve between Talledega and Birmingham, only, and its services entailed delay through interchange over the Birmingham gateway. Georgia Highway served all four points but its service was also condemned. Ryder Truck Lines was authorized to serve the points of Childersburg, Sylacauga and Sycamore and was, in fact, offering the only service that would approach reliability. This is the carrier that later *abandoned* service at the points.

The fact that Dixie Highway had withdrawn its protest and Ryder had abandoned service was pointed out in the affidavit. It was pointed out in the affidavit that Alabama Highway had promised to institute LTL service at the four points (49a) but had failed to do so. It was pointed out in that affidavit that none of the protestants had improved their service or tendered any service different in character or kind from that available at the time of the hearing.

Thus, Childersburg and Sylacauga were left with the unreliable service of Baggett Transportation Company and Georgia Highway between those points on the one hand and Chattanooga and Atlanta on the other. There was no single line service between the two points and South Carolina. Sycamore was left with no LTL service by protestants to any of the destinations. Talledega was left with direct service to Atlanta and Chattanooga by one carrier only.

All the above facts were given to the Commission by affidavits attached to the Petition for Further Hearing

and those affidevits were in the hands of Division I, Acting as an Appellate Division, prior to the issuance of its report on July 14, 1965. In that report, Division I, Acting as an Appellate Division, cited the service of the above carriers, and especially Ryder, as affording adequate and satisfactory service to the points involved. The real effect of the order of Division I dated July 14, 1965, is that the Commission does not think small shippers in the four points, because they are small shippers, are *entitled* to the same service that the large shippers have available to them. Your appellants say that there has been an arbitrary abuse of discretion by the Commission under the circumstances. The National Transportation Policy certainly makes no distinction on such grounds. That policy, in part, is as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; . . ." (Preface to Title 49, USC, Chapter 1)

The Motion to Affirm should be denied.

Respectfully submitted,

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